# In the Supreme Court of the United States

OCTOBER TERM, 1951

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No. 515

ANNIS WYCHE AND ROBERT C. THORPE, PETITIONERS

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The majority and concurring opinions of the Court of Appeals (R. 50-52) are not yet reported.

### JURISDICTION

The judgment of the Court of Appeals was entered on November 23, 1951 (R. 53). On December 19, 1951, the time for filing a petition for a writ of certiorari was extended to January 8, 1952, by order of the Chief Justice (R. 55). The petition

was filed January 7, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

## QUESTIONS PRESENTED

1. Whether there was probable cause for the issuance of a search warrant.

2. Whether there was probable cause for the arrest of petitioners who were in the premises at the time of the execution of the search warrant by officers.

3. Whether the court's charge to the jury, to which defense counsel made no exception, constituted reversible error.

4. Whether the evidence was sufficient to support the convictions.

## STATUTES INVOLVED

22 D.C. Code (1940 ed.) 1501 provides:

> If any person shall within the District keep, set up, or promote, or be concerned as owner, agent, or clerk, or in any other manner, in managing, carrying on, promoting, or advertising, directly or indirectly, any policy lottery, policy shop, or any lottery, or shall sell or transfer any chance, right, or interest, tangible or intangible, in any policy lottery, or any lottery, or shall sell or transfer any ticket, certificate, bill, token, or other device, purporting or intended to guarantee or assure to any person or entitle him to a chance of drawing or obtaining a prize to be drawn in any lottery, or in a game or device commonly known as policy lot-

tery or policy or shall, for himself or another person, sell or transfer, or have in his possession for the purpose of sale or transfer, a chance or ticket in or share of a ticket in any lottery or any such bill, certificate, token, or other device, she shall be fined upon conviction of each said offense not more than $1,000 or be imprisoned not more than three years, or both. The possession of any copy or record of any such chance, right, or interest, or of any such ticket, certificate, bill, token, or other device shall be prima-facie evidence that the possessor of such copy or record did, at the time and place of such possession, keep, set up, or promote, or was at such time and place concerned as owner, agent, or clerk, or otherwise in managing, carrying on, promoting, or advertising a policy lottery, policy shop, or lottery. (Mar. 3, 1901, 31 Stat. 1330, ch. 854, sec. 863; June 30, 1902, 32 Stat. 535, ch. 1329; Apr. 5, 1938, 52 Stat. 198, ch. 72, sec. 1).

22 D.C. Code (1940 ed.) 1502 provides:

If any person shall within the District have in his possession, knowingly, any ticket, certificate, bill, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for the purpose of playing, carrying on, or conducting any lottery, or the game or device commonly known as policy lottery or policy, he shall be fined upon conviction of each said offense not more than $500 or be imprisoned for not more than six months, or both. (Apr. 5, 1938, 52 Stat. 198, ch. 72, sec. 2).

STATEMENT

On August 1, 1950, a two-count indictment (R. 1) was filed against the petitioners and two others, charging (1) the carrying on of a numbers game in violation of 22 D.C. Code (1940 ed.) 1501, *supra*, and (2) possession of numbers slips in violation of 22 D.C. Code (1940 ed.) 1502, *supra*. After a jury trial, all four defendants were convicted on both counts. Petitioner Wyche was sentenced to concurrent terms of imprisonment for six to eighteen months on the first count and six months on the second count. Petitioner Thorpe was sentenced to concurrent terms of imprisonment for nine to thirty-six months on the first count, and six months on the second count. (R. 50-51.)[1] On appeals taken by petitioners their convictions were affirmed by the court below (R. 50-52).

The Government's uncontroverted evidence may be summarized as follows:

On May 19, 1950, two police officers and an informant, Irma Young, appeared before the United States Commissioner and executed affidavits to the effect that they had good cause to believe that the first floor of the premises at 39 Massachusetts Avenue, N.W., in the District of Columbia, and an adjacent one-story building, No. 39½, were being used as a numbers turn-in place. The affidavit of

[1] The other defendants, Reed and Porter, were given suspended sentences of from six to eighteen months and were placed on probation. They did not appeal from the conviction (Pet. 7).

the officers stated that, having reliable information that the premises were being used for such purpose, they observed 20 men and women entering the premises between 1:00 p.m. and 2:20 p.m. on May 16. Similarly on May 17 and 18 they saw about 18 men and women enter the premises. For the most part, the same people appeared on each of the three days, and when entering they had paper bags or bulging pockets which the officers had reason to believe contained numbers slips. After entering No. 39 these persons went through the front room into No. 39½, remained a few minutes, and then came away empty-handed. The affidavit concluded with the statement that these facts were substantiated by Irma Young who had formerly resided at No. 39. (R. 46-47.) The affidavit of Irma Young recites various facts showing her personal knowledge of the fact that No. 39½ was a "numbers place", derived from having lived at No. 39, having observed numbers slips being turned in and taken away, and having placed numbers bets herself (R. 47). On the basis of these affidavits the Commissioner issued a search warrant for the first floor of No. 39 and for No. 39½, directing the seizure of any tickets, books, papers, memoranda or devices used in promoting the numbers game (R. 44-45).

The two police officers testified that on that same day, at 2:00 p.m., they went to the premises at No. 39 Massachusetts Avenue, N.W., with the search

warrant (R. 5, 23), and entered the house through a back door (R. 8, 23). They observed 12 or 14 persons in the room. Thorpe was the closest to the officers and they observed that he had a large paper bag in his hand. Wilhelmina Porter was seated at a table or desk in the middle of the floor behind an adding machine. (R. 8-9, 23.) On desks in the room, there were two adding machines, money, envelopes, numbers slips and a telephone. More money and slips were found in the desk drawers. (R. 9.) On the floor along the wall, where several people had been standing when the officers first entered the room, they found numbers books from which slips had been torn, and adding machine tape, such as a turn-in person receives to account for amounts turned in (R. 17).

Also found in the house were more numbers turn-in slips, another adding machine, adding machine tape, more money, envelopes, and a telephone (R. 9, 15-16, 17-18, 45).

The officers asked Thorpe what he had in the bag that he was holding and he replied that it was cement. Officer Pizzata looked in the bag and found about $600 in rolls of coins and one dollar bills. (R. 8, 13, 23-24.) Thorpe told the officers that he had just come by a few minutes before and "I'd have been gone in another two minutes. I'd have been gone. Just came by to pick up some money." (R. 14, 24.)

About five minutes after the officers entered the room, Wyche walked in through the rear door (R.

9). He was searched and seven envelopes containing numbers slips were taken from his coat pocket, and money in the amount of $98 in small bills and about $18 in pennies, nickels, dimes, and quarters, were taken from his trouser pockets (R. 11, 14-15). A notebook was found in his inside coat pocket (R. 15).

Petitioners made no motion to suppress the evidence before trial. At the trial, when counsel learned that the government did not intend to call Irma Young as a witness, counsel argued that defendants had a right to be faced with the person on whose affidavit the warrant was issued (R. 2). The court observed that his objection went to the sufficiency of the Government's evidence and should more properly be raised after the Government had put in its case (R. 2-3).

As soon as the Government's first witness, Officer Bean, testified that he had a search warrant when he entered the premises involved, defense counsel again objected on the ground that the affidavits on which the warrant was issued must be proved, and that the affidavit of the two officers was insufficient in itself to justify the issuance of the warrant (R. 6). Defense counsel stated that he was not making a motion to suppress evidence [2] but

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[2] In fact defense counsel gave as the reason why he did not make such a motion, the fact that, under *Gibson* v. *United States*, 149 F. 2d 381 (C.A. D.C.), certiorari denied *sub. nom. O'Kelley* v. *United States*, 326 U.S. 724, the movant must show some property right in the premises or the thing seized. He asserted that he was making no such claim. (R. 7-8.)

merely attacking the legality of the search warrant because of the absence of the affiant Irma Young from the courtroom. The court overruled the objection (R. 6-8).

At the close of the Government's case, defense counsel again made a "general objection with respect to the warrant" (R. 26), and an objection to the evidence obtained from Wyche and Thorpe (R. 26-27). Both objections were overruled by the court on the ground that the search was made incident to execution of a valid search of the premises. On the question of legality of the warrant, the trial court held that the affidavit of the two police officers based on hours of observation of the premises over the course of three days is (R. 28) "sufficient justification in affidavit form for a search warrant without reference to the last paragraph, which says they have further substantiation made by the affidavit of Irma Young, and so forth."

ARGUMENT

1. Petitioner's attack on the validity of the search under the warrant is without merit. It is clear, as defense counsel conceded at the trial (R. 6) that the affidavits of the police officer and Irma Young established probable cause for the issuance of the warrant. In view of the fact that trial counsel disclaimed any intention to make a motion to suppress the evidence, it was unnecessary for the government to produce Irma Young as a witness.[3]

[3] Under the circumstances, it is unnecessary to consider whether petitioner's failure to file a motion to suppress under

In any event, as the district court ruled, the personal observations by the officers showed circumstances sufficient to give rise to a reasonable belief that a crime was being committed on the premises, and, thus, their affidavit in itself showed probable cause for the warrant. *Dumbra* v. *United States,* 268 U.S. 435, 441; *Brinegar* v. *United States,* 338 U.S. 160, 175-176; *Seymour* v. *United States,* 177 F. 2d 732 (C.A. D.C.).

2. Petitioners also contend that their arrest, and the search of their persons incident thereto was illegal. However, an officer of the District of Columbia may lawfully arrest without warrant persons who he has probable cause to believe have committed a felony. *Newyahr* v. *United States,* 177 F. 2d 658 (C.A. D.C.), certiorari denied, 338 U.S. 936; *Maghan* v. *Jerome,* 88 F. 2d 1001, 1002 (C.A. D.C.). Here, in a secret hideout for illegal activities, the officers found petitioner Thorpe with a bag in his hand of the type commonly used in bringing in the fruits of that illegal activity. While they were there, petitioner Wyche entered through the rear door, showing familiarity with the enterprise. As the court below held, the officers

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Rule 41(e) deprived them of standing to raise the issue at this time. It is evident from the circumstances set forth in the Statement, supra, pp. 7-8, that trial counsel tried to get the benefits of a motion to suppress without denominating it as such, because he was unwilling to assert on behalf of his clients any proprietory interest in either the premises searched or the property seized. Under such circumstances, the majority of the court below was correct in holding that petitioners cannot be deemed to have made a motion to suppress.

clearly had reason to believe that petitioners were participants in the illegal venture. *Beard* v. *United States,* 82 F. 2d 837, 844 (C.A. D.C.), certiorari denied, 298 U.S. 655.

3. Petitioners object (Pet. 29-34) to the court's statement in its charge (R. 39) that:

> I should first of all explain to you that the relationship of these people to each other in the eyes of the law is that of accomplices. I say that because the law provides that regardless of the degree of guilt which exists between any defendants, if they all operate together in a mutual undertaking or a joint enterprise, each one is equally guilty with the others for the conduct of any one.

They argue that this constitutes an expression of opinion as to guilt. A reading of the full charge refutes such contention. The court fully instructed the jury on the burden of proof factor, the definition of proof beyond a reasonable doubt, and the role of a jury in weighing the evidence. Manifestly the jury could not have been misled by this instruction.

Moreover, at the trial, defense counsel failed to request any special instruction before the charge to the jury was given (R. 32), and after the charge, defense counsel stated that he had no further request for any instruction, and took no exception to the instructions as given (R. 43). This non-compliance with Rule 30 of the Federal Rules of Criminal Procedure precludes the consideration of such

objections for the first time on appeal since there is clearly no plain error affecting substantial rights. *Villaroman* v. *United States*, 184 F. 2d 261, 262 (C.A. D.C.).

4. Petitioners erroneously assume (Pet. 27-29) that they could be found guilty only on the theory that they aided and abetted Reed and Porter in the commission of the crimes charged, and argue that there is no evidence of a common intent in furtherance of a previously formed common design. Their assumption is incorrect. Each petitioner was charged as a principal, and there is substantial evidence to support the conviction of each petitioner individually. Each was found in a numbers establishment in possession of the impedimenta of that illicit trade under circumstances which justify the conclusion that each was engaged in the business there being conducted. Cf. *Beard* v. *United States*, *supra* (82 F. 2d at p. 844). Moreover, the collocation of circumstances clearly establishes a common design to commit the offense charged, and establishes the fact that both petitioners, together with Reed and Porter, were participants in a joint criminal venture.

CONCLUSION

The decision below is correct and no conflict of decisions is involved. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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